85-285

Supreme Court, U.S.
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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAYMOND K. PEIL,

Petitioner

v.

CHARLES E. SPORCK,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR CERTIORARI—DISCOVERY

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QUESTIONS PRESENTED

1. Where, in the course of pre-trial discovery, an attorney shows his client documents which he did not prepare, but which he selected from among all documents previously produced in discovery, are the selected documents entitled to protection as work product because the attorney selected them if his role in selecting them would not have been revealed but for his own disclosure of that fact?

2. When examination of a witness at a deposition proceeds in accordance with the Federal Rules of Evidence, is the District Court limited in its application of Federal Rule of Evidence 612 to consideration of the deponent's own statements alone that documents he reviewed to prepare himself for his deposition did or did not influence his testimony or that he did or did not rely upon the documents in giving his testimony?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Charles E. Sporck, a defendant in the case of *Raymond K. Peil v. Charles E. Sporck, Peter Sprague and National Semiconductor Corporation*, Civil Action No. 77-4244, United States District Court for the Eastern District of Pennsylvania and respondent here, was petitioner in the Court of Appeals on a petition for a writ of mandamus. Neither Peter Sprague nor National Semiconductor Corporation were parties to the proceedings before the Court of Appeals.

Respondent in the proceedings in the Court of Appeals was Raymond K. Peil, plaintiff in the civil action in the District Court and petitioner here. Nominal respondents in the proceedings before the Court of Appeals were the Honorable John B. Hannum and Honorable Anthony J. Scirica,[1] Judges, United States District Court for the Eastern District of Pennsylvania.

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1. By Order dated November 9, 1984, the underlying Civil Action was reassigned from Judge Hannum to Judge Scirica, as a newly-appointed judge, as part of normal court procedure.

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OPINIONS BELOW

On April 18, 1985, the United States Court of Appeals for the Third Circuit filed an Opinion, which is reported at 759 F.2d 320. It is reproduced herein as Appendix A, *infra*, pp. A1-19. It reversed and remanded the Order entered by the Honorable John B. Hannum, Judge of the United States District Court for the Eastern District of Pennsylvania, on August 22, 1984, and Judge Hannum's Order of October 31, 1984, which reaffirmed on a Petition for Rehearing his Order of August 22nd. A copy of Judge Hannum's Order of August 22, 1984, is reproduced herein as Appendix B, *infra*, p. A20. A copy of Judge Hannum's Memorandum and Order Denying

Rehearing is reproduced in Appendix C, *infra*, pp. A21-28. On May 21, 1985, the Court of Appeals entered its Order and Judgment Denying a Petition for Rehearing which had been timely filed. A copy of the Order Sur Petition for Rehearing is reproduced in Appendix D, *infra*, pp. A29-30.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals for the Third Circuit was entered on April 18, 1985. An order denying a timely Petition for Rehearing In Banc was entered on May 21, 1985. (Appendix D, *infra*, pp. A21-28). Copies of the April 18, 1985, judgment and the May 21, 1985, order are included in the Appendix to this Petition. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES

The Federal Rules of Civil Procedure provide in pertinent part:

Rule 26(b)(1). In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable

from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Rule 26(b)(3). Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusion, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 30(c). Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. . . .

Rule 34(a). Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including

writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. . . .

Rule 34(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. . . . The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of summons and complaint upon that defendant. . . . The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Rule 37(a)(1). Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken.

Rule 37(a)(2). . . . [I]f a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request.

The Federal Rules of Evidence provide in pertinent part:

Rule 612. Writing Used to Refresh Memory. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the Court of Appeal's granting of a petition for mandamus filed by Charles E. Sporck, the respondent here.

In 1977, petitioner instituted a lawsuit in the United States District Court for the Eastern District of Pennsylvania under Section 10 of the Securities Exchange Act of 1934, alleging misrepresentation and non-disclosure of material facts in connection with the purchase and sale of the stock of National Semiconductor Corporation (the "Civil Action"). Respondent Charles E. Sporck is a defendant in the Civil Action and is president of National Semiconductor Corporation ("NSC"). NSC and Peter Sprague are the other defendants in the Civil Action, but were not parties to the proceedings before the Court of Appeals.

During pre-trial discovery in the Civil Action, the defendants produced documents to plaintiff in response to his discovery requests.

In the course of discovery, Mr. Sporck's deposition was commenced on May 16, 1983. (Mand. Pet., Exhibit A).[2] Before the deposition, his counsel wrote to plaintiff's

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2. The record in the Court of Appeals on the Petition for Mandamus consisted of (1) the Petition for Mandamus, to which were appended nine exhibits; (2) Respondent Raymond K. Peil's Answer, Including Memorandum of Law, to Petitioner Charles E. Sporck's Petition for Writ of Mandamus to which was appended one exhibit consisting of a slip opinion of the United States District Court for the Western District of Pennsylvania in *S & A Painting Co., Inc. v. OWB Corp., et al.*, Civil Action No. 82-2332 (November 6, 1984) (Ziegler, J.); and (3) Respondent Raymond K. Peil's Petition for Rehearing In Banc. The nine exhibits appended to the Mandamus Petition are (1) portions of the transcript of the Deposition of Charles E. Sporck taken on May 16, 1983 in the Civil Action (Exhibit A); (2) Plaintiff 's Request for Production of Documents by Defendant Charles E. Sporck (Exhibit B); (3) Defendant Charles E. Sporck's Response to Plaintiff's Request for Production of Documents (Exhibit C);

counsel to ask that she identify those documents she intended to use at the deposition. (Mand. Pet., Exhibit G, and Exhibit A thereto). Among the reasons Mr. Sporck's counsel gave for the requested identification were that "it will enable us to prepare Mr. Sporck for the deposition more quickly since we will know in advance those documents you intend to use," and "the deposition will no doubt proceed more quickly since Mr. Sporck will have had the opportunity to review the documents you intend to use prior to your examination about them." (*Id.*) Mr. Sporck's counsel also noted that "the events at issue occurred seven years ago and I am certain that it will move the deposition along more quickly if Mr. Sporck has had an opportunity in advance to refresh himself." (*Id.*)

Plaintiff's counsel responded to the request for identification of documents by noting that the document selection process was not complete, that petitioner expected to receive additional documents, and that whether or not a particular document would be used at

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(4) Plaintiff 's Motion to Compel Production of Documents by Defendant Charles E. Sporck (Exhibit D); (5) the District Court's Order of August 22, 1984, in the Civil Action Granting in Part and Denying in Part Plaintiff's Motion to Compel Production of Documents by Defendant Charles E. Sporck (Exhibit E); (6) the District Court's Memorandum and Order of October 31, 1984, Reaffirming the District Court's Order of August 22, 1984 Ordering Defendant Charles E. Sporck to Produce Documents Reviewed by Him in Preparation for His Deposition (Exhibit F); (7) Defendants' Memordandum in Opposition to Plaintiff's Motion to Compel Production of Documents by Defendant Charles E. Sporck, to which, in turn, are appended Exhibits A and B (Exhibit G); (8) portions of the transcript of a Hearing on Motions in the District Court in the Civil Action and in a related Civil Action on August 22, 1984 (Exhibit H); and (9) a Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania in *Mongeau v. Curz, et al.*, Civil Action No. 83-4054 (slip op. April 27, 1984) (Pollak, J.). Reference to "Mand. Pet." is to the Petition for Writ of Mandamus filed by Charles E. Sporck with the Court of Appeals. The documents appended to the Mandamus Petition are referred to by their exhibit letter as appended to the Mandamus Petition.

the deposition would depend on Mr. Sporck's answers to deposition questions. (Mand. Pet., Exhibit G, and Exhibit B thereto). Nonetheless, petitioner's counsel did identify eight categories of documents she intended to use at Mr. Sporck's deposition. (*Id.*)

Before Mr. Sporck's deposition, his counsel selected an unknown quantity of documents from among all the documents the defendants had produced earlier in response to plaintiff's discovery request. (Mand. Pet., Exhibit A at 12). Mr. Sporck's counsel showed him the selected documents as part of their preparation of him for his deposition. (*Id.*) None of the documents selected by Mr. Sporck's counsel was prepared by counsel. (Mand. Pet., Exhibit A at 10; Mand. Pet. 6, n. 3). Some of the documents selected by Mr. Sporck's counsel to show to him in preparation for his deposition contained margin notes and interlineations of defense counsel. (Mand. Pet., Exhibit A at 13). The documents reviewed by Mr. Sporck were not in any sort of grouping (Mand. Pet., Exhibit A at 10), and neither Mr. Sporck nor his counsel ever revealed whether the documents were in a particular order or remained collected in the form in which Mr. Sporck reviewed them. (*Id.*)

At the start of Mr. Sporck's deposition, plaintiff's counsel asked whether in preparation for his deposition he had occasion to examine any documents. (*Id.* at 9). Mr. Sporck answered affirmatively. (*Id.*) Petitioner's attorney then orally requested identification and production of the documents. (*Id.* at 10-11). Thereupon, Mr. Sporck's attorneys *volunteered* that they had selected the documents reviewed by Mr. Sporck. (*Id.* at 11). Plaintiff's counsel then served Mr. Sporck with a written request for production pursuant to Rule 34 of the Federal Rules of Civil Procedure of all documents he examined, reviewed or referred to in preparation for the session of his deposition commencing May 16, 1983. (*Id.* at 11; Mand. Pet., Exhibit B). In refusing the request, Mr. Sporck's counsel again *voluntarily* reiterated that "all

the documents we showed the witness are documents which had been produced in discovery in this case and that we may have selected to review with the witness." (Mand. Pet., Exhibit A at 12). Plaintiff's counsel never asked who selected the documents and never asked for the identification or production of documents selected by Mr. Sporck's counsel. (*See generally*, Mand. Pet., Exhibits A, B and D). Mr. Sporck's counsel did agree, however, to allow plaintiff's counsel to "show him [Mr. Sporck] a document and ask him if that was a document shown to him by the lawyers." (Mand. Pet., Exhibit A at 13).

Plaintiff filed a motion to compel identification and production of the documents reviewed by Mr. Sporck on the ground that all documents used in preparing the witness for a deposition are properly discoverable under Federal Rule of Evidence 612. (Mand. Pet., Exhibit D). By order of August 22, 1984, the District Court granted plaintiff's motion, and ordered that Mr. Sporck produce or identify all documents reviewed by him in preparation for his deposition. (Mand. Pet., Exhibit E). Upon Mr. Sporck's motion for reconsideration, the District Court, in an order filed October 31, 1984, reaffirmed its order of August 22, 1984, holding that although the selection of documents constituted attorney work product, it was not "opinion" work product entitled to absolute protection, and that the principles behind Federal Rule of Evidence 612 supported plaintiff's claim to identification of the documents. (Mand. Pet., Exhibit F.) Prior to the District Court's Order of October 31, 1984, plaintiff conceded that margin notations and interlineations placed upon any of the selected documents by Mr. Sporck's counsel constituted non-discoverable work product. (Mand. Pet., Exhibit F at 7). The District Court's Order of October 31, 1984, specifically directed the production or identification by Bates number of the selected documents so as to preclude the disclosure of margin notations or interlineations placed on the documents by defense counsel. (Mand. Pet., Exhibit F). Mr. Sporck then petitioned the

Court of Appeals to issue a writ of mandamus directing the trial court to vacate its order of August 22, 1984 and its order of October 31, 1984

Concluding that the trial court committed prejudicial error of law in ordering the identification of the documents reviewed by Mr. Sporck before his deposition, the Court of Appeals remanded to the District Court without formal issuance of the requested writ on confidence that the District Court would proceed in accordance with the Court of Appeals' opinion. (Appendix A, *infra*, p. A15).

The Court of Appeals identified the threshold issue as whether the selection process of Mr. Sporck's counsel in grouping for their client's review documents out of all of the ones produced in the Civil Action was work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). (Appendix A, *infra*, p. A8). Noting that Rule 26(b)(3) recognizes a distinction between "ordinary" and "opinion" work product first articulated in *Hickman v. Taylor, supra*, the court concluded that the selection and compilation of documents by Mr. Sporck's counsel fell within the "highly-protected category of opinion work product." (*Id.* at p. A10).

Next, the Court of Appeals found that Federal Rule of Evidence 612 did not apply to the facts of this case to remove any protection that Mr. Sporck's counsel's selection process would have as opinion work product. (*Id.* at pp. A11-15). The court determined that Rule 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: (1) the witness must use the writing to refresh his memory; (2) the witness must use the writing for the purpose of testifying; and (3) the court must determine that production is necessary in the interests of justice. (*Id.* at p. A12). Finding that the first condition required proof that a witness' memory actually have been refreshed and finding that the plaintiff had failed to elicit testimony

from the deponent which would establish the first two conditions, the court concluded that plaintiff's counsel failed to lay a proper foundation under Rule 612 for production of the documents reviewed by Mr. Sporck in preparation for his deposition. (*Id.* at pp. A13-14). The court reasoned that if plaintiff's counsel had first solicited specific testimony from Mr. Sporck, and then questioned him as to which, if any, documents had formed that testimony, then the work product Mr. Sporck sought to protect would not have been implicated. (*Id.* at p. A14).

Judge Seitz dissented on the grounds that one could not extrapolate backwards from the results of a document selection process to determine the attorney's reason for selecting a document. (Appendix A, *infra*, pp. A16-17). In addition, he felt that the gratuitously volunteered fact of the attorney's document selection should not be permitted to provide the link between a document and the attorney's thought processes, and, thereby, be permitted "to cloak the non-work product aspects of the information sought with work product protection." (*Id.* at p. A17). Judge Seitz would not reach on a petition for writ of mandamus the contention of Mr. Sporck that the documents were protected "fact" work product, believing that such an issue should be committed to the discretion of the District Court. (*Id.* at p. A18).

Finally, because Judge Seitz found no disclosure of the attorney's work product which would provide a basis for granting the Writ of Mandamus, he would not reach the issue of whether a proper foundation had been established for the requested information under Federal Rule of Evidence 612 or the provision covering relevant evidence found in Federal Rule of Civil Procedure 26(b)(1). (*Id.* at pp. A18).

EXISTENCE OF JURISDICTION BELOW

The District Court for the Eastern District of Pennsylvania had jurisdiction over the securities law claims

raised in the Civil Action under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa. The Court of Appeals asserted jurisdiction over the respondent's Petition for Mandamus under the All Writs Act, 28 U.S.C. §1651(a).

REASONS FOR GRANTING WRIT

I. Even if an attorney selects for his client's review documents not otherwise prepared by the attorney, any work product involved in the document selection is not revealed or implicated in a request for production of documents reviewed by the client. Voluntary disclosure of the selection process by the selecting attorney should not be permitted to prevent legitimate discovery of the documents.

The Court of Appeals defined the threshold issue in this case as "whether the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of *Hickman v. Taylor*, 329 U.S. 495 (1947)." Appendix A, *infra*, p. A8. Although the issue identified by the Court of Appeals is *an* issue here, a necessarily antecedent and more fundamental issue is whether there was sufficient linkage between the documents selected by respondent's counsel for his client's review and the attorneys' selection process to justify extending work product protection to the documents themselves. Because the Court of Appeals failed to address this fundamental issue, it expanded the work product doctrine in a manner which will significantly restrain and confuse legitimate discovery in litigation in the federal courts.

The purpose of the work product doctrine is to provide an attorney with a "zone of privacy" within which to properly prepare his case. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Therefore, with respect to a request for

production of documents, the question on any assertion of a privilege of work product must be whether the production of the documents impinges upon this recognized zone of privacy.

Where documents are not prepared by an attorney, their production does not reveal the attorney's mental impressions, legal theories or legal strategies. Here, Mr. Sporck conceded that the individual documents selected by his attorney for his review were not attorney work product, Appendix A, *infra*, p. A8; Mand. Pet., Exhibit A at 10; Mand Pet., p. 6, n3, and the District Court ordered production or identification of the documents in a manner which would insure against disclosure of any interlineation or margin notes placed on the documents by Mr. Sporck's counsel. Appendix C, *infra*, p. A28. Thus, the documents themselves do not invoke the work product doctrine. The inquiry then must be whether, even though the contents of the documents themselves do not reveal attorney work product, the context of production reveals work product.

In this case, the Court of Appeals looked toward, but did not analyze, two cases which involved the issue of extension of work product protection to documents included in the selection process. In *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982), the District Court determined that binders containing documents selected by an attorney and shown to witnesses to prepare them for their depositions were work product. In that case, the request for production of the documents was directed specifically to the binders which, in turn, were clearly identified as containing those documents selected, grouped and ordered by the opposing party's attorney. It does not appear from the opinion whether it would have been possible to produce the documents without identification of the fact that they had been assembled into binders. In any event, the document request clearly probed the selection process itself. Similarly, in *Berkey Photo, Inc. v. Eastman Kodak Co.*,

74 F.R.D. 613 (S.D.N.Y. 1977), an order of a magistrate supervising discovery called for deposition of expert witnesses and for the production of all material given to the experts to prepare for their depositions. Among the materials used to prepare for the deposition of defendant's experts were notebooks prepared by defense counsel consisting of "his synthesis of the facts and factual issues," *Id.* at 614, and representing defense counsel's "'legal analysis, mental impressions and . . . legal judgment as to what facts were needed to be understood, mastered, and possibly presented in the trial. . . .'" *Id.* Thus, the notebooks consisted of a particular factual organization prepared by the defendants' attorneys.

In *Julian* and *Berkey*, then, the request for production of documents would have called for revelation of a particular organization and grouping of documents or facts. Necessarily, the organization and/or grouping was identified in the context of the discovery request or order governing discovery. Production of the documents in this context would necessarily reveal these documents to be the product of the attorney's efforts and analysis. Thus, the considerations which protected the selection process extended to the documents themselves precisely because the attorneys' selection process was unavoidably disclosed in the context in which the documents or facts were to be produced.

Here, in contrast, but for Mr. Sporck's counsel's gratuitous volunteering of the relationship between the documents and his selection of them, the attorney's selection of them could readily (and legitimately) have been kept from the adversary party. The documents were not shown to Mr. Sporck in any sort of grouping, Mand. Pet., Exhibit A at 10, and neither Mr. Sporck nor his counsel revealed whether the documents were ever in an ordered group or remained collected in the form in which Mr. Sporck reviewed them. *Id.* The document request itself did not ask for the production of documents selected by Mr. Sporck's counsel, did not ask who selected

them, and did not ask that they be produced in any particular order. Mand. Pet., Exhibit B. Even if they had been collected and grouped together by Mr. Sporck's counsel, nothing would have prevented Mr. Sporck from producing or identifying the documents in some order which would not reveal any grouping.

That that documents reviewed here are a subset of all documents produced does not reveal who made the decision about the selection process or why. Indeed, even if the selection process were revealed here, it does not follow, as Judge Seitz noted in his dissenting opinion, that "one can extrapolate backwards from the results of the selection process to determine the reason a document was selected for review by the deponent. There are many reasons for showing a document or selected portions of a document to a witness." Appendix A, *infra*, p. A16. On the record here, one could easily assume that a document was shown to Mr. Sporck because it was among a group of documents identified by *petitioner's* counsel in response to a request for such identification by Mr. Sporck's own counsel Mand. Pet., Exhibit G, and Exhibits A and B thereto.

At best, one might *guess* that documents reviewed by a party in preparation for his deposition were selected by his attorneys. However, one might as readily guess that the attorney asked his client what the client thought were relevant documents, and then told his client to review them. (At issue here is not the colloquy between client and attorney about the documents, regardless who selected them. There has been no attempt by the petitioner to ask Mr. Sporck what he and his attorney discussed at the time the documents were reviewed.)

One could make the same guess about an attorney's role in response to an interrogatory calling for the identification of facts, persons, or documents or in response a request for production of documents. One might *guess* that the attorney selected the identity of the fact, person, or document which was relevant to the interrogatory or

document request. To protect from discovery the identification of such facts, persons or documents because of the possible or even probable attorney's role in the selection of them would simply gut discovery under the Federal Rules of Civil Procedure.

Fear that a party's adversary may guess an attorney's role in selecting documents, or fear that a party's adversary may guess what importance the attorney attaches to them is too attenuated a basis for justifying the extension of the work product doctrine to documents simply because the attorney selected them. Moreover, if the relationship of the documents to the selection process is that attenuated, then it is improbable that an attorney would not use the documents to prepare his client for a deposition or would forego sifting the documents or other analysis in the case. Indeed, the relationship between the documents and the selection process is so attenuated that the selecting attorney can easily keep the selection process secret.

There was no need to disclose the selection process here, nor does it appear that there is ever a need to do so where the documents requested are not themselves work product. Similarly, there is no need to make such disclosure where, if the documents are not work product, the request for documents is confined to the documents themselves and is not addressed to their grouping or to the particular format in which they are reviewed. The production of documents under such circumstances, without comment by the producing party on the selection process and without identification of any particular grouping or compilation format, will not reveal the selection process.

By revealing the selection process where it is otherwise unnecessary to do so and where the documents themselves would not reveal the selection process in the context of production, counsel waives whatever protection the selection process has. This is not a waiver which

has been argued to arise from showing a protected document to a client or an expert or a non-party witness. *See, e.g., James Julian, Inc. v. Raytheon Corp., supra*, 93 F.R.D. at 145-6 and cases cited therein. The waiver here arises from disclosure direct to one's adversary outside of the pursuit of trial preparation, and in a manner inconsistent with the maintenance of secrecy against one opponents. *See, United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

Indeed, to permit the cloaking of non-work product aspects of information sought with work product protection simply by the volunteering of information about the relationship between the two is inconsistent with an earlier opinion of the Third Circuit Court of Appeals in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3rd Cir., 1984).

In *Bogosian v. Gulf Oil Corp., supra*, 738 F.2d at 595, the Court of Appeals addressed the circumstance in which a document reviewed by a witness might contain both facts and an attorney's legal theories. In commenting that the adversary party would be entitled to discovery of the facts contained in such a document, the Court of Appeals noted:

> It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure *if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product*. Where such combinations exist, it will be necessary to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic. The Advisory Committee Notes also recognize this need. They state "in enforcing [the Rule 26(b)(3) protection of lawyers' mental impressions and legal theories], the Courts will sometimes find it necessary to order disclosure of a document but with portions deleted."

Id.(emphasis added).

It is difficult to conceive of a circumstance in which the facts contained in a document shown to an expert and mingled with legal theories would not also have been facts selected by the attorney. There is no reason to distinguish between the documents in this case (containing facts) and the facts which the Court suggests it would not protect from discovery in *Bogosian v. Gulf Oil Corp., supra.* Here, the work product element is intermingled with the "facts" solely because Mr. Sporck's attorney affirmatively disclosed his role in the selection process. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield the documents from discovery by the expedient of disclosing his attorney's role in selecting the documents. *Bogosian v. Gulf Oil Corp., supra,* 738 F.2d at 595.

Petitioner does not assert that all requests to identify or produce documents reviewed by a deponent in preparation for a deposition are legitimate or must be honored. Rule 26(b)(1) of the Federal Rules of Civil Procedure gives the District Court discretion to determine what is and what is not legitimate discovery and to limit discovery on grounds sufficient to protect against an unwarranted request. Where that is a matter of concern, however, the standard of review should be whether the District Court abused its discretion. This standard does not usually invoke the extraordinary remedy of the All Writs Act, 28 U.S.C. §1651(a). *Will v. United States,* 389 U.S. 90, 95 (1967); *Kerr v. United States District Court,* 426 U.S. 394, 402 (1976) ("And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction', *Will v. United States, supra,* 389 U.S., at 95, 88 S.Ct., at 273, the fact still remains that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy.' *Ibid.*")

By protecting documents which are not themselves work product simply because an attorney interjected his work product into the document request procedure, the Court of Appeals expands the availability of the work product doctrine beyond its formulation by this Court and Congress. In doing so, the Court of Appeals unnecessarily curbs the discretion of the District Court and limits unnecessarily the scope of legitimate discovery. The practical effect of the Court of Appeals' decision is far reaching, affecting the District Courts' and parties' conduct of and the results of the important discovery stage in the development of a lawsuit. For this reason, this Court should review the Court of Appeals' decision.

II. Whether or not documents reviewed by a deponent to prepare for his deposition are work product, Federal Rule of Evidence 612 does not require the deposing party to establish his right to the production of documents through the deponent's statements alone. The District Court has discretion to consider all the facts and circumstances, and may permit examination of a document used to refresh memory even if the witness denies the document affected his testimony.

The Court of Appeals' conclusion that the documents selected by Mr. Sporck's attorneys were protected by the work product doctrine put before it a question posed but not answered in *Bogosian v. Gulf Oil Corp.*, *supra*, 738 F.2d at 595 n.3, "concerning the direct conflict between Rule 612 and Rule 26(b) (3) that arises when a witness uses a document prepared by an attorney to refresh a witness' recollection." Appendix A, *infra*, p. A14, n.7.

In this case, the documents reviewed were not themselves work product, and it was not the selection process itself which could be said to have refreshed the witness' recollection. Thus, while Federal Rule of Civil Procedure 26(b)(3) could be said to protect the selection process,

Federal Rule of Evidence 612 arguably focuses on the documents themselves and might have weighted their effect on testimony over the indirect protection afforded them because of the selection process.

Whether or not intended to avoid this conflict, the Court of Appeals' analysis of Federal Rule of Evidence 612 makes Rule 612 almost impossible to apply to documents reviewed before testifying. In particular, the Court found that Rule 612 requires the deposing party to establish that a document used before testifying actually refreshed the witness' memory and requires the deposing party to establish this predicate fact through the witness' own testimony. Appendix A, *infra*, pp. A12-15. The result is a procedure which ignores the practical operation of Rule 612 and erroneously restricts the discretion granted the district courts by the Federal Rules of Civil Procedure and Federal Rule of Evidence 612 to compel production of documents in order to test credibility and memory.

The court's analysis ignores the practical operation of Rule 612 because it fails to distinguish the circumstances which exist when a witness uses a document to refresh memory while testifying from those which exist when the witness uses a document to refresh memory before testifying.

A witness who establishes that he cannot recall information about a subject area *while testifying*, may attempt to refresh his recollection by reference to a writing. While testifying, the witness openly establishes that his memory is faulty or needs to be refreshed before he uses the document. Whether or not the document actually refreshes his recollection is visibly demonstrated by comparison of the witness' testimony before and after he uses the document. Before his adversary obtains the document under Rule 612(1), there will have been objective proof of the witness' credibility and memory with respect to the subject matter at hand and with respect to the document itself.

In contrast, there is no opportunity for an objective, comparative demonstration if, before testifying, the witness examines documents to prepare for his testimony. Before testifying, the witness has unlimited access to documents which may shape his testimony; yet the witness is free to deny or may not be able to determine that the documents had any effect upon him or his testimony.

The Court of Appeals erroneously assumes that in either set of circumstances the deposing party can establish a documents' influence simply through the witness' own testimony. Indeed, the Court of Appeals quite clearly limits the deposing party to the witness' own statements as a means of establishing the impact of a document upon testimony. Appendix A, *infra*, p. A13. If a witness were to deny that a document or documents affected his testimony or could not remember if a document or documents affected his testimony, then on the court's analysis, the deposing party is not entitled even to identification of the documents in order to test the deponent's claims about his memory.

Rule 612 is not as restrictive as the Court of Appeals reads it. It does not require that the "adverse party" establish from the witness' own admissions and nothing else that the documents reviewed before testifying influenced the witness' testimony.

A District Court judge, on the totality of the facts presented to him, has discretion under Rule 612 — and is the one best able — to determine the credibility of a witness' statement that his recollection was not refreshed by documents he reviewed before testifying or that the witness did or did not use the document to prepare for his testimony. The trial judge is also best able to determine whether the documents were reviewed "for the purpose of testifying" so as to avoid "wholesale exploitation of the opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." Report of Committee on the Judiciary,

House of Representatives, 93d Cong., 1st Sess., No. 93-650, November 15, 1973 at 13. Nothing in Rule 612 or its legislative or advisory committee history suggests that the Court or the parties must limit themselves to the witness' own statement that documents he reviewed before testifying had no impact on his testimony or were not used by him for the purpose of testifying.

The limitations imposed by the Court of Appeals upon the use of Rule 612 may have arisen from a concern that there be no possible inquiry which would "implicate" the deponent's attorney's work product in connection with the selection of documents reviewed before testifying. *See*, Appendix A, *infra*, p. A13-14. However, the limitation is unnecessary because "selection work product" is not disclosed in the documents themselves.

The procedure advanced by the Court of Appeals to avoid implication of the selection work product does not, in fact, address the way in which work product was "implicated" here. The Court of Appeals would have the deposing attorney first obtain testimony on specific subject matters and then ask what documents, if any, formed the witness' testimony on a particular subject matter. Appendix A, *infra*, p. A13. This procedure does not prevent the deponent's attorney from volunteering that the documents which may have formed the testimony were selected by the attorney, thereby, permitting him to shield them from discovery as work product.

The best and simplest procedure to protect against disclosure of "selection work product" is for the attorney engaged in the selection not to disclose that fact. In such a case, there is no "implicated" work product. Moreover, in such a situation, whether the deposing attorney's document request is simply an attempt to live off the wits of his adversary, is a fishing expedition, or is otherwise illegitimate is properly disposed of under the discretion granted the District Court under Federal Rules of Civil Procedure 26(b)(1) and 26(c).

The Court of Appeals seemed in fact to have been offended by the timing of the document request at issue here, which was made at the very beginning of the deposition, before there had been any inquiry into specific subject areas of testimony. The real effect of the procedure advanced by the Court of Appeals is simply to delay such a request for documents until later in the deposition after there had been particular inquiry and to limit the documents produced to specific subject matters about which the deposing party doubted the deponent's memory. Whether or not this is a salutary procedure springing from a valid concern, the concern addresses a matter properly the subject of the District Court's discretion and should not compel review on a petition for writ of mandamus.

The Court of Appeals also appeared concerned that petitioner's counsel might be obtaining discovery through the wits of his adversary. *See*, Appendix A, *infra*, pp. A14-15. This concern has no basis in the record of this case.

On the record below, respondent's counsel wrote to petitioner's counsel before respondent's deposition to ask that the petitioner identify a select group of documents so that respondent could use them to prepare for his testimony and to refresh his recollection. Mand. Pet., Exhibit G. Respondent's counsel's requests and his reasons for making them were submitted to the District Court by the respondent himself in connection with the Court's determination of whether the documents respondent reviewed for his deposition should be produced. *Id.* The District Court was able to determine from all of the circumstances, including statements of respondent's own counsel, whether or not the documents he reviewed before testifying were reviewed for the purpose of testifying, and could determine the likelihood that they had or would have had an impact upon his testimony.

Moreover, respondent's counsel stated on the record that all of the documents reviewed by the respondent

were a subset of documents earlier produced to the petitioner by the defendants in the Civil Action below. Mand. Pet., Exhibit A at 12. Thus, the Court, in exercising its discretion under Rule 612, could readily determine that petitioner was not engaged in a "fishing expedition."

In *Hickman v. Taylor, supra,* 329 U.S. at 394, the Court recognized that a legitimate purpose of discovery is to expose facts which may impeach or corroborate. As the Court of Appeals acknowledged, the purpose of Federal Rule of Evidence 612 is to promote the search for credibility and memory. Appendix A, *infra*, p. A11. Consistent with these goals the District Court should have discretion under Federal Rule of Evidence 612 and the Federal Rules of Civil Procedure to order production of the reviewed documents in order to permit an objective evaluation of the witness' claims about his memory or lack of it. In this case, out of concern for "implicated work product," the Court of Appeals limits the District Court in a manner inconsistent with the scope and purpose of the Federal Rules of Civil Procedure and Federal Rule of Evidence 612. If the witness denies that his memory was refreshed by a document or set of documents, then under the Court of Appeals' analysis there is no further objective evaluation of that claim.

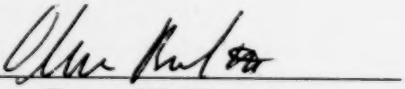
Thus, the Court of Appeals weakens the ability of the deposing party and the Court to address evidentiary concerns about credibility and memory which may arise in the course of discovery and which are properly addressed in deposition discovery by Federal Rule of Evidence 612. For this reason, this Court should review the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Date: August 19, 1985

Respectfully submitted,

By: 

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3023

CHARLES E. SPORCK,

Petitioner

vs.

RAYMOND K. PEIL, on behalf of himself and all others similarly situated,

Respondents

and

HONORABLE JOHN B. HANNUM and HONORABLE ANTHONY J. SCIRICA, JUDGES, UNITED STATES DISTRICT COURT,

Nominal Respondents

(Related to Civ. 77-4244 E.D. of PA)

ON PETITION FOR WRIT OF MANDAMUS

Present: SEITZ, ADAMS and HUNTER, *Circuit Judges*

ORDER

Upon consideration of the petition for writ of mandamus, petitioner's memorandum in support thereof and respondent's answer and after hearing oral argument by counsel February 20, 1985, it is hereby ORDERED that the cause be remanded to the Disrict Court for proceedings in accordance with the opinion of this Court.

ATTEST:

Clerk

April 18, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3023

CHARLES E. SPORCK

Petitioner

vs.

RAYMOND K. PEIL. on behalf of himself
and all others similarly situated

Respondents

and

HONORABLE JOHN B. HANNUM and HONORABLE
ANTHONY J. SCIRICA JUDGES. UNITED STATES
DISTRICT COURT

Nominal Respondents

Petition for Writ of Mandamus

Argued: February 20. 1985

Before: SEITZ. ADAMS. and HUNTER.
Circuit Judges

Opinion filed April 18. 1985

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This case arises on a Petition for Writ of Mandamus involving a discovery dispute between the parties to a securities fraud class action suit. The underlying action involves an allegation by plaintiff-respondent Raymond K. Peil that defendant National Semiconductor Corporation ("NSC"), defendant-petitioner Charles F. Sporck, NSC's president, and defendant Peter J. Sprague, NSC's chairman, conspired to inflate artificially the value of NSC stock, in order to enable Sporck and Sprague to sell their own shares at the inflated level. The wrongful conduct alleged includes various misrepresentations and nondisclosures of material facts during an eight-month period continuing from July 1, 1976, until March 1, 1977. Jurisdiction in this court is based on the All Writs Act, 28 U.S.C. § 1651(a) (1982).

2. During pretrial discovery, attorneys for Peil served numerous sets of combined interrogatory and document requests on defendants. In response, defendants produced hundreds of thousands of documents, from which Peil's attorneys selected more than 100,000 for copying. There is no allegation in this case that defendants have improperly concealed or refused to produce requested documents.

3. The issue presently before this court arose on May 16, 1983, at the deposition of defendant-petitioner Sporck. Prior to the deposition, counsel for defendants had prepared Sporck for his expected week-long deposition by showing him an unknown quantity of the numerous documents produced by defendants in response to plaintiff's discovery requests. Defense counsel selected and compiled these documents in a folder in Philadelphia, and transported them to California solely for the deposition. According to defense counsel, the selected documents represented, as a group, counsel's legal opinion as to the evidence relevant both to the allegations in the case and the possible legal defenses. It is conceded that none of the individual documents, in their redacted form, contained work product of defense counsel.

4. At the inception of the Sporck deposition, Peil's attorney asked: "Mr. Sporck, in preparation for this deposition, did you have occasion to examine any documents?" (Petition, Exhibit A at 9). Sporck answered affirmatively, and Peil's attorney first orally, and then by written motion pursuant to Federal Rule of Civil Procedure 34, requested identification and production of "[a]ll documents examined, reviewed or referred to by Charles E. Sporck in preparation for the session of his deposition commencing May 16, 1983." (Petition, Exhibit B). Defense counsel refused to identify the documents, arguing first that all the documents had previously been produced, and second, that the select grouping of the documents was attorney work product protected from discovery by Federal Rule of Civil Procedure 26(b)(3). Defense counsel agreed, however, to allow Peil's counsel to ask Sporck about his reliance on individual documents in the context of specific factual questions, and Sporck's deposition continued on this basis.

5. Peil filed a motion to compel identification and production of the selected documents, on the ground that all documents used in preparing a witness for a deposition are properly discoverable under Federal Rule of Evidence 612. (Petition, Exhibit D). By order of August 22, 1984, Judge John B. Hannum granted Peil's motion, and ordered that defendant produce or identify all documents reviewed by Sporck in preparation for his deposition. (Petition, Exhibit E). Upon petitioner's motion for reconsideration, Judge Hannum reaffirmed his order, holding that although the select grouping of documents constituted attorney work product, it was not "opinion" work product entitled to absolute protection, and that the principles behind Federal Rule of Evidence 612 supported Peil's claim to identification of the documents. (Petition, Exhibit F). Sporck now asks this court to issue a writ of mandamus directing the trial court to vacate both orders.[1]

I.

6. The remedy of mandamus is properly invoked only in extraordinary situations and where "necessary or appropriate in aid of [appellate] jurisdiction." 28 U.S.C. § 1651(a) (1982); *see, e.g., Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). In order to ensure that a writ of mandamus will issue only in limited circumstances, the Supreme Court has required that "a party seeking issuance have no other adequate means to attain the relief he desires," *id.* at 35, and that the petitioner satisfy the "burden of showing that [his] right to issuance of the writ is 'clear

1. By order dated November 9, 1984, the underlying action was reassigned from Judge Hannum to Judge Anthony J. Scirica, as a newly-appointed judge, as part of normal court procedure. For this reason, both judges have been named nominal respondents in the Petition.

and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953). Further, because "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable,'" a writ of mandamus will only be granted for clear error of law. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

7. In the case before us, petitioner has established that the issue in dispute "may at some future time come within the court's appellate jurisdiction,"[2] that post-trial relief would be inadequate because the harm caused by identifying the selected documents would be irreparable,[3] and that he has no other adequate means to obtain the relief sought other than by writ of mandamus.[4] Further, we

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2. *United States v. Christian*, 660 F.2d 892, 894 (3d Cir. 1981). Review of discovery orders clearly falls within the appellate jurisdiction of the federal courts. *See, e.g., Hickman v. Taylor*, 329 U.S. 495 (1946).

3. "When a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy . . . for compliance with the production orders complained of destroys the right sought to be protected." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984).

4. The trial court's order compelling identification of the documents is interlocutory in nature, and thus is not appealable under 28 U.S.C. § 1291 (1982) until a final order is rendered in the litigation. *See, e.g. Borden Company v. Sylk*, 410 F.2d 843 (3d Cir. 1969). Further, petitioner would have no immediate right of appeal even if he were held in civil contempt for failure to comply with the trial court's orders, and thus has no real choice but to comply with the order and identify the documents. *See, e.g. DeMasi v. Weiss*, 669 F.2d 114, 122-23 (3d Cir. 1982). Finally, immediate appellate review by certification is proper only where the challenged order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (1982).

believe that review of the issue presented in this case "would comport with the instructional goals of mandamus." *United States v. Christian*, 660 F.2d 892, 897 (3d Cir. 1981). Because petitioner raises an issue new to this court and discussed in only a few reported district court decisions,[5] review by mandamus, if otherwise appropriate, is consistent with the court's supervisory function. *See, e.g., Schagenhauf v. Holder*, 379 U.S. 104 (1964); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591-92 (3d Cir. 1984).

8. The question remains, however, whether petitioner's right to immediate relief by writ of mandamus is "clear and indisputable" because of clear error of the law by the trial court. Although discovery orders are normally committed to the discretion of the trial court, *see, e.g. DeMasi v. Weiss*, 669 F.2d 114, 122 (3d Cir. 1982), petitioner argues that the trial court's failure to protect defense counsel's work product from discovery as mandated by Federal Rule of Civil Procedure 26(b)(3) constituted clear error of law. Respondent argues, however, that the trial court correctly ordered the identification of the documents used to prepare petitioner for his deposition, either under a theory of waiver of work product immunity, or through a balance of the respective policies of Federal Rule of Evidence 612 and Federal Rule of Civil Procedure 26(b)(3). Because we find neither a waiver of work product immunity nor a correct application of Federal Rule of Evidence 612 to this case, we agree with

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see Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958) (in banc) (noting that § 1292(b) "is to be used only in exceptional cases where an immediate appeal may avoid protracted and expensive litigation . . ."). On the facts of this case, we find that the latter requirement is not met.

5. *See, e.g. James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

petitioner that the trial court should not have ordered the identification of the documents selected by counsel.

II.

9. The threshold issue in this case is whether the selection process of defense counsel in grouping certain documents together out of the thousands produced in this litigation is work product entitled to protection under Federal Rule of Civil Procedure 26(b)(3) and the principles of *Hickman v. Taylor*, 329 U.S. 495 (1946). Petitioner concedes that the individual documents that comprise the grouping are not attorney work product, but argues that the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation. Because identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions, petitioner argues that identification of the documents as a group must be prevented to protect defense counsel's work product. We agree.

10. The work product doctrine had its modern genesis in the seminal opinion in *Hickman v. Taylor*, 329 U.S. 495 (1947). In *Hickman*, the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." 329 U.S. at 510. Preserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine. Without this zone of privacy:

> Much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be

> his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511.

11. The work product doctrine as articulated in *Hickman* has been partially codified in Federal Rule of Civil Procedure 26(b)(3). That rule conditions the production of "documents and tangible things" prepared in anticipation of litigation by or for an opposing party on the moving party's showing of substantial need and undue hardship. Even where such a showing is made, however, the trial court, in ordering the production of such materials, "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). Thus, Rule 26(b)(3) recognizes the distinction between "ordinary" and "opinion" work product first articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947).

12. Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses. *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *see also* Special Project, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 818-19 (1983) (cases cited therein). Such material is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies

on its own wit in preparing their respective cases. *See, e.g. Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979).

13. We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product. As the court succinctly stated in *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982):

> In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research. There can be no doubt that at least in the first instance the binders were entitled to protection as work product.

See also Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (notebooks representing "counsel's ordering of 'facts,' referring to the prospective proofs, organizing, aligning, and marshalling empirical data with the view to combative employment that is the hallmark of the adversary enterprise" categorized as work product). Further, in selecting the documents that he thought relevant to Sporck's deposition, defense counsel engaged in proper and necessary preparation of his client's case. As the Supreme Court noted in *Hickman:*

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the

> necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interest.

329 U.S. at 510-11. In the instant case, without the protection that the work product doctrine accords his preparation, defense counsel may have foregone a sifting of the documents, or at the very least chosen not to show the documents to petitioner. As a result, petitioner may not have been as well-prepared for his deposition, and neither plaintiff nor defendant would have realized the full benefit of a well-prepared deponent's testimony. For these reasons, Rule 26(b)(3) placed an obligation on the trial court to protect against unjustified disclosure of defense counsel's selection process.

14. This conclusion, however, does not end the issue. Respondent argues, and the trial court agreed, that operation of Federal Rule of Evidence 612 removed any protection that defense counsel's selection process would ordinarily enjoy. Because we find that Federal Rule of Evidence 612 does not apply to the facts of this case, we disagree.[6]

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6. To the extent that the trial court's decision turned on a finding that petitioner "waived" any work product protection when the various documents, including the selected ones, were shown to him, the court's recent decision in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984), is controlling. In that case, the court held that merely showing alleged work product to a witness did not amount to waiver of the work product privilege. *Id.* at 593. Further, we disagree with respondent's argument that defense counsel waived work product protection by suggesting that counsel could show each individual document to petitioner and ask petitioner if defense counsel showed that document to him. As we read the record, defense counsel made no such concession, but merely informed deposing counsel that he could ask about documents in the context of specific factual questions, a practice we specifically endorse in Part III of this opinion.

III.

15. Federal Rule of Evidence 612 provides in relevant part:

> [I]f a witness uses a writing to refresh his memory for the purpose of testifying. . . . (2) before testifying, if the court in its discretion determines it is necessary in the interest of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

This rule is applicable to depositions and deposition testimony by operation of Federal Rule of Civil Procedure 30(c) ("Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence."). *See, e.g., James Julian, Inc. v. Raytheon, Co.*, 93 F.R.D. 138, 144 (D. Del. 1982). Although applicable to depositions, Rule 612 is a rule of evidence, and not a rule of discovery. Its sole purpose is evidentiary in function - "to promote the search of credibility and memory." Fed. R. Evid. 612 advisory committee note.

16. By its very language, Rule 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. Fed. R. Evid. 612. The first requirement is consistent with the purposes of the rule, for if the witness is not using the document to refresh his memory, that document has no relevance to any attempt to test the credibility

and memory of the witness. *See, e.g., United States v. Wright*, 489 F.2d 1181, 1188-89 (D.C. Cir. 1973) (party must lay foundation for document production request by establishing first that witness used document prior to testifying to refresh his memory).

17. The second requirement - that the witness use the document for the purpose of testifying - was designed "to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in part to have an impact upon the testimony of the witness." Fed. R. Evid. 612 advisory committee note. As with the first requirement, the second requirement recognizes that the document is of little utility for impeachment and cross-examination without a showing that the document actually influenced the witness' testimony. *See, e.g., Mongeau v. Kurz*, C.A. No. 83-4054 (E.D. Pa. April 2, 1984). Finally, the third requirement codifies the Supreme Court's holding in *Goldman v. United States*, 316 U.S. 129, 132 (1942), that even though a witness may review notes prior to testifying, a trial court should exercise discretion to guard against "fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. (1973).

18. In the case before us, the apparent conflict between the protected status of defense counsel's document selection process under Rule 26(b)(3) and the asserted need, for cross-examination purposes, of the identification of the documents actually selected resulted from the failure to establish the first two requirements under Rule 612. In seeking identification of all documents reviewed by petitioner prior to asking petitioner any questions concerning the subject matter of the deposition, respondent's counsel failed to establish either that petitioner relied

on any documents in giving his testimony, or that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking petitioner the source of that testimony. *See, e.g., Bercow v. Kidder, Peabody & Co.*, 39 F.R.D. 357 (S.D.N.Y. 1965). We conclude, therefore, that deposing counsel failed to lay a proper foundation under Rule 612 for production of the documents selected by counsel.

19. Indeed, if respondent's counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect - counsel's opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel - would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on. The fear that counsel for petitioner's work product would be revealed would thus become groundless.

20. Rule 612, therefore, when properly applied, does not conflict with the protection of attorney work product of the type involved in this case.[7] Because the trial court did not properly condition its application of Rule 612 on a showing that petitioner relied upon the requested documents for his testimony and that those

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7. Because we resolve this case by finding Rule 612 inapplicable, we have no occasion to comment on the *dictum* in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 n.3 (3d Cir. 1984), concerning the direct conflict between Rule 612 and Rule 26(b)(3) that arises when a witness uses a document prepared by an attorney to refresh the witness' recollection.

documents impacted on his testimony, the court committed legal error. This error became prejudicial when it implicated work product of petitioner's counsel. Proper application of Rule 612 should never implicate an attorney's selection, in preparation for a witness' deposition, of a group of documents that he believes critical to a case. Instead, identification of such documents under Rule 612 should only result from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed.[8] In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary.

IV.

21. We conclude, therefore, that the trial court committed clear error of law in ordering the identification of the documents selected by counsel. Because we are confident that the district court will proceed in accordance with our opinion without formal issuance of the writ, we will remand to the district court. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 596 (3d Cir. 1984); *United States v. RMI Co.*, 599 F.2d 1183, 1190 (3d Cir. 1979); *Rapp v. Van Dusen*, 350 F.2d 806, 814 (3d Cir. 1965) (in banc).

---

8. Contrary to the dissent's characterization of our opinion, therefore, we are not approving "in effect the use of the work product doctrine to prevent an identification of documents reviewed by a witness in preparation for his deposition." Slip op. at ___. The proper use by deposing counsel of Rule 612 in cases similar to this one will result in identification of documents relied upon by a witness without implicating the work product doctrine.

SEITZ, *Circuit Judge*, dissenting.

The majority approves in effect the use of the work product doctrine to prevent an identification of documents reviewed by a witness in preparation for his deposition. I dissent because I am convinced that such a ruling is an impermissible expansion of the work product doctrine at the expense of legitimate discovery.

The plaintiffs-respondents sought in the district court the discovery of relevant objective facts: the identities of the documents that the deponent reviewed prior to testifying. These facts are not, in themselves, the opinion or thought processes of an attorney. Nor were the contents of the documents, all of which had already been produced by the defendants, created by defendants' attorney in anticipation of litigation.

Yet, the defendant-petitioner claims that the mere identification of the documents examined prior to his deposition would reveal his attorney's litigation strategy. Presumably, the petitioner's argument must be that if the respondents knew which documents were reviewed, they could, upon examination of the documents identified, draw conclusions as to why each document was chosen.

The problem with the petitioner's theory is that it assumes that one can extrapolate backwards from the results of a selection process to determine the reason a document was selected for review by the deponent. There are many reasons for showing a document or selected portions of a document to a witness. The most that can be said from the fact that the witness looked at a document is that someone thought that the document, or some portion of the document, might be useful for the preparation of the witness for his deposition. This is a far cry from the disclosure of the a lawyer's opinion work product. Even assuming that the documents were selected by the petitioner's attorney, the subject matter is so undifferentiated that its potential for invasion of work product is miniscule

at best. *See In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (degree to which information reveals attorney's thought processes is a factor in whether opinion work product is revealed). *See also United States v. Amerada Hess Corp.*, 619 F.2d 980, 988 (3d Cir. 1980) (list of employees interviewed, selected out of all the corporation's employees, is not opinion work product).

Every act by a litigant or his attorney gives rise to similar vague inferences. For example, a typical interrogatory from a leading treatise would permit questions of the following form: "Identify each writing . . . which relates or refers directly or indirectly to [a transaction in question]". *See, e.g.*, 2A L. Frumer & M. Waxner, Bender's Federal Practice Forms, 420.11, question 19 (1984). It cannot seriously be contended that an answer is not required because it would reveal the fact that the attorney thought that certain documents were relevant to the transaction.

Moreover, in order to claim the shield of opinion work product, it must be established that it is the attorney's thought processes that are revealed. *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982). The respondents' request did not require the identification of the person who selected the documents. The only disclosed connection to the petitioner's attorney in our situation is that the petitioner gratuitiously volunteered the fact that his attorney selected the documents. To permit this volunteered information to provide a necessary link to attorney's thought processes, as the majority has done, is to permit the petitioner to cloak the non-work product aspects of the information sought with work product protection. Certainly an attorney cannot cloak a document under the mantle of work product by simply reviewing it. *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1982). It is difficult to see how an attorney or

his witness may insulate the discoverable fact that the witness reviewed a particular document by volunteering that the attorney selected the document for deposition preparation purposes. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

Finally, the petitioner contends that the information sought was "fact" work product, and that the respondents have made an insufficient showing of need to require its production. Assuming without deciding that the information sought was fact work product, I would not decide this issue on a petition for a writ of mandamus. To reach this issue would require us to review a decision committed to the discretion of the district court. *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d at 1240-41, and such decisions do not constitute "clear and indisputable" legal error. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Further, revelation of fact work product does not constitute the same sort of irreparable harm that would come from the revelation of opinion work product.

Because I find no disclosure of the attorney's work product that would provide a basis for granting the writ, I would not reach the issue of whether a proper foundation had been established for the requested information under Federal Rule of Evidence 612 or the provision covering relevant evidence found in Federal Rule of Civil Procedure 26(b)(1). Decisions on such matters are not independently reviewable on a petition seeking the extraordinary remedy of mandamus.

Based on the record presented by the petitioner, I fail to see how any conclusions may be drawn as to what his attorney may or may not have thought about this litigation. The mere identification of documents used to prepare a witness for his deposition does not convey any meaningful information of the type entitled to protection under the work product doctrine. I would deny the petition.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R.K. PEIL, on behalf of himself and all others similarly situated	:	CIVIL ACTION
vs.	:	
NATIONAL SEMICONDUCTOR CORP., CHARLES E. SPORCK and PETER J. SPRAGUE	:	NO. 77-4244

ORDER

AND NOW, this 22nd day of August, 1984, upon consideration of Plaintiffs' Motion To Compel Production Of Documents By Defendant Charles E. Sporck (Docket Entry No. 94), Defendants' responses thereto, the entire record herein, and for the reasons set forth in this Court's August 22, 1984, bench ruling in this matter, it is hereby ORDERED that Plaintiffs' motion is GRANTED in part and DENIED in part as follows:

1. Defendants shall produce all documents reviewed by Defendant Charles E. Sporck in preparation for his deposition; and

2. Plaintiffs' request for production of all documents mentioned by Defendant Charles E. Sporck during his deposition is DENIED.

_____

J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R.K. PEIL, on behalf of himself and all others similarly situated	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL SEMICONDUCTOR CORP., CHARLES E. SPORCK and PETER J. SPRAGUE	:	NO. 77-4244

MEMORANDUM AND ORDER

HANNUM, *J.* OCTOBER 31st, 1984

Defendant, Charles E. Sporck, by his motion (Docket Entry No. 174), requests this Court to reconsider its August 22, 1984 Order (Docket Entry No. 166) requiring him to produce all documents he reviewed in preparation for his deposition. [1]

The plaintiff had sought production of those documents in his motion to compel discovery (Docket Entry No. 94). That motion was premised on Federal Rule of Evidence 612 which the plaintiff contended was made applicable to depositions by FED. R. CIV. P. 30(c). Rule 30(c) provides that at a deposition "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." Rule 612 provides that a court may, if in its discretion it determines it is necessary in the interest of justice, order that a writing used by a witness before testifying to refresh his memory for the purpose of testifying

1. The Court's August 22, 1984 Order (Docket Entry No. 166) also denied the plaintiff's request for production of all documents mentioned by the defendant during his depositon. This aspect of the Order is not at issue.

be produced at the hearing to permit the adverse party to inspect it, to cross-examine the witness thereon and to introduce in evidence those portions which relate to the testimony of the witness.

Anticipating the defendant's claim that the documents requested were protected from discovery by the attorney work product privilege, codified in FED. R. CIV. P. 26(b)(3),[2] the plaintiff contended that the privilege had been waived by using the documents to refresh the defendant's memory prior to his deposition. As support for his argument, the plaintiff relied on several opinions which all followed the reasoning of the court in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613 (S.D.N.Y. 1977).

> [Given the] modern views favoring broad access to materials useful for effective cross-examination, embodied in rules like 612, it is disquieting to posit that a lawyer may "aid" a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other, and different materials, available

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2. The genesis of the work product privilege is Hickman v. Taylor, 329 U.S. 495, 512 (1947) in which the United States Supreme Court recognized "the general policy against invading the privacy of an attorney's course of preparation." FED. R. CIV. P. 26(b)(3) provides that an attorney's work product may be discovered:

> only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

> later to a cross-examiner, in the preparation of witnesses. When this simple choice emerges the decision to give the work product to the witness could well be deemed a waiver of the privilege.

Id. at 616. *See James Julian, Inc. v. Roytheon Co.,* 93 F.R.D. 138 (D.Del. 192); *Marshall v. United States,* 88 F.R.D. 8 (D.D.C. 1980); *Wheeling-Pittsburgh Steel v. Underwriters Labs,* 81 F.R.D. (N.D.Ill. 1978); *Prucha v. M & N Modern Hydraulic Press Co.,* 76 F.R.D. 206 (W.D.Wis. 1977); *Bailey v. Meister Brau, Inc.,* 57 F.R.D. 11 (N.D.Ill. 1972).

The defendant contended that the documents requested were not ordinary work product but contained his attorney's mental impressions and therefore, pursuant to FED. R. CIV. P. 26(b)(3), the court should protect them from disclosure. The protection to be afforded such work product, the defendant noted, is strong, especially "in view of the fact that 'since *Hickman v. Taylor,* [329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, (1947)] the Supreme Court has never permitted intrusion in the work-product revealing the attorney's thought processes.' " *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods,* 92 F.R.D. 779, 781 (S.D.N.Y. 1982) (citing 3 Weinstein Evidence ¶612 [04] at 612-40 (1981)). With respect to the requested documents the defendant did not allege that they were prepared by counsel, but rather only that they contained notations on them by counsel and were selected by counsel "from among the 100,000 documents already produced to plaintiff in discovery. . . ." *James Julian, Inc.,* 93 F.R.D. at 144 was cited for the proposition that in a case "involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research."

Having contended that the requested documents contain the mental impressions of counsel, the defendant argued that this Court should adopt the reasoning

of the court in *Beatrice Foods*. In that case, the defendant sought to compel production of the digest of a deposition containing marginal notes by plaintiff's attorney which had been read by a witness in preparation for a deposition. The *Beatrice Foods* Court noted that none of the courts which concluded that the attorney work product privilege is waived by allowing review of materials by a witness had "dealt with the type of documents at issue here; that is, those containing *solely* the mental impressions of an attorney concerning pending litigation." *Id.* at 780 (emphasis added). The Court recommended the proposal of Judge Weinstein in his treatise on evidence that:

> If the adverse party demands material which the party producing the witness claims reflects solely the attorney's thought processes, the judge should examine the material *in camera*. Unless the judge finds that the adverse party would be hampered in testing the accuracy of the witness' testimony, he should not order production of any writings which reflect solely the attorney's mental processes.

Neither party cited any authority from the Third Circuit either in their memoranda of law or during a hearing held on August 22, 1984. This Court did not find *Beatrice Foods* persuasive because the documents requested by the plaintiff in this case do not contain solely the mental impressions of the defendant's attorney. In balancing the competing interests of full disclosure and the maintenance of confidentiality, this Court concluded that the defendant had waived any applicable attorney work product privilege. The Court stated that "it is disquieting to posit that a lawyer may 'aid' a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance." *Berkey Photo, Inc.*, 74 F.R.D. at 616.

The defendant has sought reconsideration on the basis of *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) which he contends mandates that this Court deny

plaintiff's motion to compel.[3] In *Bogosian*, the defendants sought to compel production of certain memoranda prepared by plaintiff's counsel and reviewed by expert witnesses prior to their depositions which plaintiffs contended were protected from discovery because they consisted of attorney work product.[4] The court noted that the plaintiffs described the material as "documents prepared by attorneys containing solely their mental impressions and thought processes relating to the legal theories of a complex case" and, since the defendants were willing to accept this description, it would assume that the documents at issue may reflect the legal theories of the plaintiffs' attorney. *Id.* at 593. The documents, the court concluded, represented "core work product" and were therefore entitled to heightened protection.

The *Bogosian* Court held that the strong policy against disclosure of documents consisting of core

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3. The defendant also relies in part on Mongeau v. Kurz, No. 83-4054 (E.D. Pa. April 22, 1984). The court in *Mongeau* noted that despite the apparent division of authority on the issue of the propriety of court-ordered disclosure of privileged documents under Federal Rule of Evidence 612,

> these opinions can be reconciled in light of each court's recognition that court-ordered disclosure of materials used to refresh a witness' recollection prior to testifying is only appropriate when the court, in its discretion, determines that such disclosure is within the meaning of Rule 612, "necessary in the interests of justice." Thus, in any particular case, the court must examine the facts and circumstances to determine whether disclosure is warranted.

4. *Id.*, slip. op at 4.

> The issue before the court concerned the interaction between FED. R. CIV. P. 26(b)(3) and 26(b)(4) which provides for discovery of facts known and opinions held by experts. The court, however, commented that it believed "that the same reasoning applies to reject the contention made before the district court, but not pressed on appeal that Fed. R. Evid. 612 governing documents used to refresh a witness' memory requires disclosure." *Bogosian*, 738 F.2d at 595 n.3.

attorney's work product protects such documents from disclosure. *See Bogosian*, 738 F.2d at 595. It also provided a procedure to be followed to protect core work product.

> Of course, where the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product. Where such combinations exist, it will be necessary to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic. The Advisory Committee Notes also recognize this need. They state, "In enforcing [the Rule 26(b)(3) protection of lawyers' mental impressions and legal theories], the courts will sometimes find it necessary to order disclosure of a document but with portions deleted."

Id.

The plaintiff concedes that *Bogosian* prohibits him from obtaining the marginal notes on the requested documents made by defendant's counsel because they represent core work product. Plaintiff contends, however, that he is entitled to the production of the documents reviewed by the defendant prior to his deposition with the marginal notes redacted, or the identification of the documents if they were previously produced by the defendant.

The defendant argues that the entire set of documents constitute core work product and are therefore protected from disclosure in their entirety. As suppprt for his argument the defendant notes that the courts in *James Julian*, 93 F.R.D. at 144, and *Berkey Photo, Inc.*,

74 F.R.D. at 616 n.8 recognized that the process of selecting documents for review may reveal important aspects of an attorney's understanding of the case.

The Court concurs with the views of the courts in *James Julian* and *Berkey Photo, Inc.* concerning the importance of the process of selecting documents and that this process constitutes work product but does not believe that it elevates those selected documents to the position of being considered *core* work product. The court's opinion in *Bogosian* was premised on the plaintiff's unchallenged characterization of the documents at issue as having been prepared by attorneys and containing solely their mental impressions and thought processes relating to the legal theories of the case. The documents requested in this case were neither prepared by attorneys nor do they contain solely the attorney's mental impressions of the case.

The Court believes that the philosophy underlying the Federal Rules of Civil Procedure noted by the court in *Bogosian* and the interest of justice dictate that the plaintiff is entitled to the production of the requested documents with the marginal notes redacted or, if a particular document has been previously produced, identification of the document to enable him to identify it from among those documents previously produced.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R. K. PEIL, on behalf of himself and all others similarly situated	:	CIVIL ACTION
v.	:	
NATIONAL SEMICONDUCTOR CORP., CHARLES E. SPORCK and PETER J. SPRAGUE	:	No. 77-4244

ORDER

AND NOW, this 31st day of October, 1984, upon consideration of the plaintiff's motion to compel production of documents by defendant Charles E. Sporck (Docket Entry No. 94), defendant's memorandum in opposition to plaintiff's motion (Docket Entry No. 99), the hearing held on August 22, 1984 (Docket Entry No. 178), the Court's Order of August 22, 1984 (Docket Entry No. 164), defendant Charles E. Sporck's motion for reconsideration (Docket Entry No. 174), plaintiff's memorandum in response to defendant's motion (Docket Entry No. 175), defendant's supplemental memorandum in support of his motion for reconsideration (Docket Entry No. 177), and in accordance with the foregoing Memorandum, it is hereby ORDERED that defendant Charles E. Sporck shall produce the documents reviewed by him in preparation for his deposition, with any marginal notes or interlineations made on such documents by his counsel redacted unless the documents have already been produced, in which case, the defendant shall provide sufficient identification of each such document to permit plaintiff to identify it from among the documents previously produced by defendants.

_____

J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3023

CHARLES E. SPORCK

Petitioner

vs.

RAYMOND K. PEIL, on behalf of himself
and all others similarly situated

Respondents

and

HONORABLE JOHN B. HANNUM and HONORABLE ANTHONY J. SCIRICA JUDGES, UNITED STATES DISTRICT COURT

Nominal Respondents

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

The petition for rehearing filed by

RESPONDENT RAYMOND K. PEIL

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc,

the petition for rehearing is denied. Judges Seitz, Weis, Higginbotham, Sloviter and Mansmann would have granted rehearing in banc.

By the Court,

_____

Judge

Dated: May 21, 1985

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-285

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAYMOND K. PEIL,
Petitioner

v.

CHARLES E. SPORCK,
Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI — DISCOVERY

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where prior to a pre-trial deposition an attorney reviews with his client a group of documents selected and compiled by the attorney from among documents previously produced in discovery, is identification (or production) of the selected group of documents protected from wholesale disclosure in pre-trial discovery under Federal Rule of Evidence 612 as opinion work product?

2. When during the course of pre-trial discovery a party requests, pursuant to Federal Rule of Evidence 612, identification (or production) of all documents reviewed by a witness prior to his deposition, must the requesting party first make a showing that the three requisite conditions of Federal Rule of Evidence 612 have been satisfied?

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No. 85-285

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAYMOND K. PEIL,

Petitioner

v.

CHARLES E. SPORCK,

Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI — DISCOVERY

COUNTER-STATEMENT OF THE CASE

The discovery issue before the Court arises in the context of a complex securities fraud class action. The Amended Complaint broadly alleges a conspiracy among defendants National Semiconductor Corporation, its President Charles E. Sporck ("respondent") and its Board Chairman Peter J. Sprague to artificially inflate the value of its common stock by means of various misrepresentations and nondisclosures during the period

July 1, 1976 through March 1, 1977. Only respondent Sporck participated as a party in the proceedings before the Court of Appeals.

During pre-trial discovery, petitioner's counsel served numerous sets of interrogatories and document requests. In response, defendants produced hundreds of thousands of documents for inspection from which petitioner's counsel selected more than 100,000 for copying.

At the very inception of respondent Sporck's deposition and before posing any substantive questions, petitioner's counsel inquired broadly whether in preparation for the deposition Mr. Sporck had had an "occasion to examine any documents" (Mand.Pet. Ex. A, p. 9)[1]. After receiving an affirmative response, petitioner's counsel asked Mr. Sporck to describe "the general nature of the documents that [he] examined", and Mr. Sporck responded that he had "looked at . . . some of the documents that my attorneys showed to me last week relative to the case." (*Id.*)

Petitioner's counsel immediately made an oral request of Mr. Sporck's counsel to produce all documents they had reviewed with Mr. Sporck prior to his deposition. (*Id.* pp. 10-11). Representing that all such documents were among those previously produced in discovery, Mr. Sporck's counsel refused, on opinion work product grounds, to produce or identify the group of documents which they had hand-selected and compiled for their pre-deposition review with Mr. Sporck. (*Id.* pp. 11-13). Petitioner's counsel then reached across the table and served a formal request under F.R.Civ.P. 34 for production of such documents. (Mand.Pet. Ex. A, p. 11; Ex. B).

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1. Reference to "Mand.Pet." is to the Petition for Writ of Mandamus filed with the Court of Appeals and when followed by a letter refers to an exhibit attached to the Mandamus Petition.

At the same time that respondent's counsel refused at the deposition to turn over wholesale their entire file of selected documents, they were willing to permit petitioner's counsel to examine Mr. Sporck on the subject of particular documents in the context of specific factual questions, a practice then employed by petitioner's counsel throughout the deposition. (*Id.* p. 136, 176, 324.) At no time did petitioner's counsel ever ask, and at no time did Mr. Sporck give testimony regarding, whether each or any of the documents selected by his counsel and reviewed with him prior to his deposition had in fact refreshed his recollection concerning any matter on which he testified, had been relied upon by him for his testimony or had otherwise impacted on or influenced his testimony.

After the deposition, Mr. Sporck filed a formal response to petitioner's F.R.Civ.P. 34 request and objected to producing the requested documents on various bases, including the attorney opinion work product doctrine. (Mand.Pet. Ex. C). Petitioner filed a motion to compel production arguing that the entire file of documents selected by counsel from among documents already produced in discovery for review with Mr. Sporck was properly discoverable as a separate group under Federal Rule of Evidence 612, that any attorney work product protection attaching to that file of selected documents had been waived by the mere fact that Mr. Sporck had reviewed such documents prior to his deposition and finally that all such documents were generally "needed" to conduct an effective cross-examination. (Mand.Pet. Ex. D.)

In opposition to the motion to compel production, Mr. Sporck contended, among other things, that the file of counsel's selected documents constitutes opinion work product under F.R.Civ.P. 26(b)(3) entitled to the highest degree of protection, that the opinion work product protection of F.R.Civ.P. 26(b)(3) has not been superseded or abrogated by F.R.E. 612, that petitioner's

generalized claim of need was an insufficient showing under F.R.Civ.P. 26(b)(3) to justify compelled production of the requested documents and that, in any event, petitioner had made no showing whatsoever that the requisite conditions governing the applicability of F.R.E. 612 had been satisfied. (Mand.Pet. Ex. G.)

Initially, the district court, in its August 22, 1984 bench ruling and order, found that counsel's file of selected documents constituted opinion work product, but nevertheless ordered production reasoning that all work product protection had been "waived" by virtue of Mr. Sporck's review of the documents prior to his deposition. (Mand.Pet. Ex. E; H, pp. 34-38). Upon Mr. Sporck's motion for reconsideration, the district court, by memorandum and order dated October 31, 1984 and reported at 105 F.R.D. 463, reaffirmed its prior production order, this time on a different basis. Holding that counsel's selection of documents, although work product, did not rise to the highest protected level of "core work product," the district court concluded, without record support, that the "interest of justice" requires identification of all documents selected by respondent's counsel and reviewed by Mr. Sporck prior to his deposition. 105 F.R.D. at 466-67.

Mr. Sporck petitioned the Court of Appeals for a writ of mandamus directing the District Court to vacate its August 22, 1984 and October 31, 1984 orders compelling identification (or production) of the requested documents. In its decision, reported at 759 F.2d 312, the Third Circuit first held that the selection and compilation of documents by respondent's counsel from among the hundreds of thousands previously produced in discovery falls within the "highly-protected category of opinion work product," placing upon the district court "an obligation . . . to protect against unjustified disclosure of defense counsel's selection process." *Id.* at 316, 317. The Court of Appeals next examined the issue whether Federal Rule of Evidence 612 removed the opinion work

product protection accorded counsel's selection process and found that F.R.E. 612 "does not apply to the facts of this case." *Id.* at 317. According to the Third Circuit, F.R.E. 612 requires that a party meet three conditions before it may obtain documents reviewed by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. *Id.* In the Court of Appeals' view, petitioner had failed to establish the first two of these requisite conditions. Ruling that the district court "did not properly condition its application of Rule 612 on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony," the Court of Appeals held that this clear error of law became prejudicial "when it implicated work product of petitioner's counsel." *Id.* at 318. Confident that the trial court would proceed in accordance with its opinion without formal issuance of the requested writ, the Court of Appeals remanded to the district court. *Id.* at 319. Petitioner's request for rehearing and for rehearing en banc by the Court of Appeals was denied by order dated May 21, 1985.

REASONS FOR DENYING WRIT

The Petition for a Writ of Certiorari presents no special and important reason justifying discretionary review and is based upon a mischaracterization of the factual record and of the holding of the Court of Appeals. Documents reviewed by a witness prior to a deposition may not be ordered produced in discovery pursuant to Federal Rule of Evidence 612 without a showing that the conditions of Rule 612 have been satisfied.

The Petition for a Writ of Certiorari filed herein presents no "special and important reason" supporting such discretionary review by this Court. The decision of

the Court of Appeals does not conflict with the decision of another federal court of appeals on the same subject and does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1.[2]

Petitioner does not challenge the Third Circuit's determination that the selection by respondent's counsel of documents for review by their client from among the many documents already produced in discovery constitutes opinion work product. Instead, discretionary review is here sought on two issues (one factual and the other both factual and legal) raised here by petitioner only in the abstract, for neither can fairly be said to arise from the Third Circuit's narrow holding that the district court here committed clear, prejudicial error of law when it ordered production of documents under F.R.E. 612, over respondent's opinion work product objection, without first and at a minimum requiring petitioner to satisfy the conditions of F.R.E. 612.[3]

First, petitioner asserts there was insufficient "linkage" between the selected documents and the attorney selection process to justify opinion work product protection. According to petitioner's version of the facts of record, it was respondent's counsel who "affirmatively disclosed his role in the selection process", Petition at 18, and absent that disclosure, petitioner's counsel would not even have known that attorney work product was involved. *Id.* at 14, 15, 16, 17, 18, 19. Second, petitioner

2. The Third Circuit is the first federal appellate court to confront the precise issues raised herein concerning the interplay between F.R.Civ.P. 26(b)(3) and F.R.E. 612. 759 F.2d at 315.

3. Because it determined that the conditions of Rule 612 had not been satisfied, the Court of Appeals did not resolve the issue whether, when opinion work product is implicated, the standards of F.R.Civ.P. 26(b)(3) or those of F.R.E. 612 govern discovery requests. 759 F.2d at 318 n. 7. Respondent had argued, among other things, that F.R.Civ.P. 26(b)(3), not F.R.E. 612, determines the discoverability of such work product. (Mand.Pet.).

reads the Third Circuit's opinion as limiting to a witness's own testimony the record which a trial court may ever properly consider in determining whether the conditions of F.R.E. 612 have been satisfied. In petitioner's view, such a limitation would be an unnecessary restriction on the trial court's discretion warranting review by certiorari. Neither ground is correct as a matter of fact on this record, and neither supports granting the requested writ.

In the first place, and contrary to petitioner's repeated assertions, Petition at 14, 15, 16, 17, 18, 19, it was not respondent's counsel who disclosed his role in the document selection process thereby bringing to everyone's attention the opinion work product issue. Rather, as the record makes clear, counsel's role in the selection process was revealed quite innocently by the witness himself. Petitioner's counsel, at the very inception of the deposition and before posing any substantive questions, asked the witness broadly to describe "the general nature of the documents that [he] examined," and Mr. Sporck responded that he had "looked at . . . some of the documents that my attorney showed to me last week relative to the case." (Mand.Pet. Ex. A, p. 9). It was only then that petitioner's counsel requested production of all such documents which respondent had reviewed. (Mand.Pet. Ex. A, p. 10-11).

In any event, whether it is an attorney in making a work product objection or a witness in giving testimony who discloses, in response to a discovery request, that work product is implicated does not alter the work product characteristics of the information or document so requested. Every work product objection to a discovery request necessarily reveals the fact that it is work product which is being requested and which is being withheld for that reason. Yet, in petitioner's view, work product protection should be denied whenever an attorney raises an objection on work product grounds, since absent the objection the requesting party would not even

know that work product is involved. In this case, petitioner's contention that respondent's counsel injected the work product issue into the proceedings is both factually incorrect and legally irrelevant. Review by certiorari is certainly inappropriate on this basis.[4]

Petitioner's second contention is based upon an erroneous reading of the Third Circuit's holding as limiting to a witness's own testimony the record which a trial court may properly consider in determining the applicability of F.R.E. 612. Petition at 19, 20. As even a cursory examination of the decision reveals, the Court of Appeals' narrow ruling, based upon the facts and circumstances of record in this case, is not so restricted.

The Court of Appeals found that F.R.E. 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. 759 F.2d at 317. The Court of Appeals found that petitioner had failed to establish the first two of these requirements:

> In seeking identification of all documents reviewed by [Mr. Sporck] prior to asking [him] any questions concerning the subject matter of the deposition, [petitioner's] counsel failed to establish either that

4. Petitioner's "linkage" argument also misses the point for the simple reason that a party, such as respondent, is also entitled to work product protection. F.R.Civ.P. 26(b)(3). If Mr. Sporck had himself selected documents for pre-deposition review, the identity of those documents would also be work product discoverable only upon a showing of "substantial need" and "undue hardship". F.R.Civ.P. 26(b)(3). Whether in such circumstances a sufficient F.R.E. 612 showing would mandate application of the F.R.E. 612, rather than F.R.Civ.P. 26(b)(3), standards to a discovery request for all documents selected for review by the witness himself is similar to the question which the Third Circuit found unnecessary to resolve. 759 F.2d at 318 n. 7.

> [Mr. Sporck] relied on any documents in giving his testimony, or that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking [Mr. Sporck] the source of that testimony. We conclude, therefore, that deposing counsel failed to lay a proper foundation under Rule 612 for production of the documents selected by counsel.

759 F.2d at 318.

In the proceedings before the district court, petitioner made no attempt whatsoever to establish satisfaction of the requirements of F.R.E. 612. (Mand.Pet. Ex. D). Indeed, no record at all on this issue was developed or presented by petitioner. At the deposition itself, petitioner's counsel did not even bother to ask the witness whether each, let alone any, of the documents, reviewed by him and collected *en masse* in his counsel's file, had in fact refreshed his recollection or had in fact impacted his testimony on any subject.[5] Instead, after hearing that petitioner had reviewed documents selected and compiled by his counsel from among those already produced in discovery, petitioner's counsel immediately demanded production of all such documents without making any effort whatsoever to lay a foundation under F.R.E. 612. 759 F.2d at 318.

Before the district court, petitioner's original motion to compel argued that all work product protection had been "waived" by Mr. Sporck's review of documents selected for that purpose by his counsel, (Mand.Pet. Ex. D), a theory accepted by the trial court's initial ruling, without any consideration of the requirements of F.R.E. 612. (Mand.Pet. Ex. E, H).[6] On respondent's motion for

5. Having not even asked the question of the witness, petitioner is in no position to quarrel with the Court of Appeals' endorsement of that mode of proof. 759 F.2d at 318.

6. The automatic waiver theory was rejected by the Court of Appeals, 759 F.2d at 317 n. 6, on the basis of its prior ruling in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984).

rehearing, the district court reaffirmed its prior ruling on a different basis, again without finding that the first two requirements of F.R.E. 612 had been met. 105 F.R.D. at 466-67. It would have been unable to find satisfaction of the Rule 612 conditions in any event, since petitioner had placed before it no record whatsoever evidencing either that Mr. Sporck had in fact relied upon any, let alone each, of the documents in giving his testimony or that any, let alone each, of the documents reviewed by him had in fact influenced his testimony.

Whatever discretion a district court may have under the third condition of F.R.E. 612 to order production of reviewed documents shown to have impacted the witness's testimony when "necessary in the interests of justice," that discretion may not be exercised unless and until it is established that the first two conditions of F.R.E. 612 have also been met. Without the required showing that the witness in fact "relied upon the requested documents for his testimony and that those documents impacted on his testimony", 759 F.2d at 318, a blanket request, as here, for all documents simply reviewed by a witness would become precisely the kind of "fishing expedition" which the drafters of F.R.E. 612 specifically intended to avoid:

> The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

F.R.E. 612 Advisory Committee Note.[7]

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7. Indeed, even when it is found that a particular writing in fact was relied upon by a witness, that it in fact impacted his testimony and that the interests of justice require its production, the Rule also mandates that the trial court excise from the document any portions "not related to the subject matter of the testimony." F.R.E. 612.

The Court of Appeals' endorsement of one mode of satisfying the conditions of F.R.E. 612 cannot fairly be read to exclude, as a matter of law, other methods of proof in other factual circumstances as petitioner contends. In most, if not all, cases, a witness's denial or admission of the F.R.E. 612 conditions will end the Rule 612 inquiry, *see United States v. Wright*, 489 F.2d 1181, 1189 (D.C.Cir. 1973), and in other circumstances a witness's denial of refreshment may not be enough to foreclose a Rule 612 production order if impeached by other evidence of record.[8] Each case must be determined on its own facts. One need not speculate at this point about the full range of factual patterns that may arise in the future under Rule 612. In this instance, petitioner placed before the trial court nothing whatsoever to suggest, let alone establish, fulfillment of the Rule's conditions. He already had in his possession every document which Mr. Sporck had reviewed prior to his deposition. He did not even bother to try the obvious mode of proof, later endorsed by the Court of Appeals, of asking the witness whether any document had refreshed him or impacted his testimony. He made no effort at all to satisfy Rule 612's conditions. In short, the district court ordered wholesale disclosure under F.R.E. 612 — here of attorney opinion work product — without any Rule 612 showing at all. This was clear, prejudicial error of law. There is no reason to grant review by certiorari.

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8. As is clear from its opinion, rather than limiting the methods for showing satisfaction of the Rule 612 conditions, the Court of Appeals was demonstrating that when the Rule 612 conditions are satisfied by a correct method of foundational support, the work product doctrine would not become implicated. Since the identification of documents would then result "from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed," "deposing counsel would discover documents through his own wit, and not through the wit of his adversary." 759 F.2d at 318-19.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Seymour Kurland

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September 18, 1985

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